

March 2004

MJI Publication Updates

**Child Protective Proceedings Benchbook
(Revised Edition)**

**Criminal Procedure Monograph 2—Issuance
of Search Warrants (Revised Edition)**

**Criminal Procedure Monograph 6—Pretrial
Motions (Revised Edition)**

Juvenile Justice Benchbook (Revised Edition)

**Managing a Trial Under the Controlled
Substances Act**

Sexual Assault Benchbook

Traffic Benchbook—Revised Edition, Vol. 2

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.9 “Other Acts” Evidence

B. Evidence of Other Crimes, Wrongs, or Acts

Insert the following text on page 288, immediately before the case summary for *People v Daoust*:

The Michigan Supreme Court reversed. *People v Knox*, 469 Mich 502 (2004). The Michigan Supreme Court stated:

“Although we agree with the Court of Appeals majority’s assessment that this matter should be analyzed from the standpoint of whether admission of the contested evidence discussed above constituted plain error affecting defendant’s substantial rights, we agree with the dissenting judge that plain error requiring reversal did, in fact, occur.” *Id.* at 508.

The court concluded that evidence of the defendant’s anger during arguments with the victim’s mother was irrelevant to the issue of whether defendant committed the charged acts. The defendant’s actions during his arguments with the victim’s mother and the acts that caused the victim’s death were entirely dissimilar. Although the evidence of the victim’s prior injuries was relevant to prove that the fatal injuries were not accidental, there was no evidence that defendant committed the past abuse. Finally, the evidence of the victim’s mother’s “good character” “improperly undermined defendant’s credibility.” *Id.* at 512-514. Thus, all of the challenged evidence was admitted improperly to show defendant’s bad character and propensity to commit the charged acts. The Court stated:

“The improper admission of the evidence of [the victim’s mother’s] good character, like the admission of the evidence of

defendant's anger problems and the improper use of the evidence regarding [the victim's] prior injuries, created far too great a risk of affecting the outcome of the case, given the absence of any direct evidence that defendant committed the acts that resulted in [the victim's] death. Consequently, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for a new trial." *Id.* at 514-515.

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Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.5 Description of Property to be Seized

Insert the following paragraph after the first paragraph on page 10:

Where an officer, pursuant to a warrant, was conducting a search of the defendant's home for "[e]vidence of a fatal shooting including but not limited to any and all weapons and ammunition, spent casings, blood and/or any objects which may be on the premises which appear to have blood stains upon them . . . [,]" the officer's seizure of incriminating items contained in an expandable file folder in a closet in the defendant's home office was proper under the plain view doctrine. *People v Fletcher*, ___ Mich App ___, ___ (2004). Although the items seized from the defendant's office were not bloodstained, the officer seized the items because their incriminating nature was immediately apparent—the defendant's wife had been murdered in the home, and the file folder contained photographs of, and romantic letters from, a woman the officer recognized as a district court judge. *Fletcher, supra* at _____. Even though the items seized were not described in the warrant authorizing the officer's search, the items were properly seized because the officer was lawfully in the position from which he viewed the incriminating evidence. *Fletcher, supra* at _____.

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

3. Seizure of Items in Plain View

Insert the following language after the partial paragraph at the top of page 91:

The plain view doctrine may justify an officer's seizure of items not specifically enumerated in a search warrant if the incriminating nature of the items seized was immediately apparent to the officer, and the officer was lawfully in the position from which the items were seen. *People v Fletcher*, ___ Mich App ___, ___ (2004). After the defendant's wife was killed in the home she shared with the defendant, police officers obtained a warrant to search for "evidence of a fatal shooting including but not limited to any and all weapons and ammunition, spent casings, blood and/or any objects which may be on the premises which appear to have blood stains upon them" *Fletcher, supra* at ___. During the warrant's execution, an officer seized items contained in an expandable file folder in a closet in the defendant's home office. *Fletcher, supra* at ___. Although the items seized from the defendant's office were not bloodstained, the officer seized the items because their incriminating nature was immediately apparent—the defendant's wife had been murdered in the home, and the file folder contained photographs of, and romantic letters from, a woman the officer recognized as a district court judge. *Fletcher, supra* at ___.

The defendant argued that the items taken from the file folder were unlawfully seized because the searching officer should have "ceased any further intrusion into defendant's privacy" when it became apparent to the officer that the items in the folder were not among the items listed in the search warrant. *Fletcher, supra* at ___. According to the defendant, the officer discovered evidence of the defendant's extramarital affair as a result of the officer's illegal search, and any evidence in the file folder should be suppressed as fruit of an illegal search. *Fletcher, supra* at ___. The defendant argued that the evidence was

not lawfully obtained under the plain view doctrine because the plain view doctrine prohibits the seizure of evidence whose incriminating nature was discovered by exceeding a warrant's scope or by even the most minimal search not otherwise justified by an exception to the warrant requirements. *Fletcher, supra* at ____.

Relying on *People v Custer*, 456 Mich 319 (2001), the Michigan Court of Appeals concluded that the officer's examination of the file folder's contents in *Fletcher* paralleled the officer's examination of photographs seized from the defendant's pocket in *Custer*. *Fletcher, supra* at _____. The Court explained that the officer in *Custer* lawfully seized the photographs from the defendant because the officer had probable cause to believe that the items in the defendant's pocket contained blotter acid. *Fletcher, supra* at _____. According to the Court:

“Once an object is lawfully seized, a cursory examination of the exterior of that object, like that which occurred here, is not, in our judgment, a constitutional ‘search’ for purposes of the Fourth Amendment. . . . This is true because a cursory examination of the exterior of an object that has already been lawfully seized by the police will produce no *additional* invasion of the individual’s privacy interest.’ [*Custer, supra* at 333-334 (emphasis in original).]

* * *

“[W]e conclude that the point where [the officer] looked inside the envelope is analogous to when the police officer in *Custer* removed the objects from the defendant’s pocket and saw from their back that they were photographs and not a blotter acid card. Just as the *Custer* defendant’s privacy interest in the photos became sufficiently diminished to allow the officer to examine them by turning the photos over, defendant’s privacy interest in the contents of the expandable envelope became sufficiently diminished to allow [the officer] to make a cursory review of the items contained in the envelope. [The officer] testified that he immediately recognized the women [sic] in the photograph as [a] district court Judge [] and the romantic letters contained within the envelope were on [the Judge]’s office stationary [sic]. Thus, the incriminating nature of the contents of the expandable envelope was readily apparent and in plain view once the contents of the expandable envelope were exposed. The expandable envelope was lawfully seized, it was lawfully opened, and its content was lawfully exposed. [The officer] could therefore lawfully examine the contents of the envelope. The trial court did not err in denying the motion to suppress.” *Fletcher, supra* at _____. (Internal citations omitted.)

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 23

Selected Issues Regarding Imposition of Adult Sentence

23.4 Alternative Sentences for Major Controlled Substance Offenses

On page 475, in the subsection beginning “**Legislation effective March 1, 2003,**” insert the following text after the dashed item describing MCL 333.7401(2)(a)(iii):

Note: The Court of Appeals has held that a defendant sentenced to a mandatory minimum term of ten years’ imprisonment under MCL 333.7401(2)(a)(iii) for an offense committed prior to March 1, 2003 is not entitled to resentencing under the amended version of that statute. *People v Thomas*, ___ Mich App ___, ___ (2004). The court found no language in amended MCL 333.7401(2)(a)(iii) that suggested the Legislature intended its amendment to operate retroactively. *Id.*

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 2

Delivery Offenses Under §§7401 and 7402

2.8 Criminal Penalties for Weight-Based Delivery Offenses Involving Schedule 1 or 2 Narcotics or Cocaine

C. 50 Grams or More, But Less than 450 Grams

The information contained in Section 2.8 on pages 52-53 was replaced in its entirety by an update published in April 2003. Referencing the April 2003 update, add the following language to the first bullet in subsection C:

A defendant sentenced to the mandatory minimum sentence in effect before March 1, 2003, is not entitled to be resentenced in accordance with the ameliorative provisions of 2002 PA 665. *People v Thomas*, ___ Mich App ___, ___ (2004). In *Thomas*, the defendant was convicted under the pre-amended version of MCL 333.7401(2)(a)(iii) of possession with intent to deliver more than 50 but less than 225 grams of cocaine for which he was sentenced to a mandatory minimum sentence of ten years' imprisonment. *Thomas, supra* at ___. Effective March 1, 2003, 2002 PA 665 retained the 20-year maximum penalty for §7401 violations but eliminated the mandatory ten-year minimum penalty. *Thomas, supra* at ___. Relying on the plain language of the paragraph added to MCL 791.234 by 2002 PA 665, the Court of Appeals affirmed the trial court's denial of the defendant's motion for resentencing. According to the Court, the relief intended by the Legislature in amending the statutes involving controlled substance violations is fully and clearly provided by the early parole eligibility available under MCL 791.234(12):

“An individual convicted of violating or conspiring to violate section 7401(2)(a)(iii) . . . of the public health code . . . before the effective date of the amendatory act that added this subsection is eligible for parole after serving the minimum of each sentence

imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.” *Thomas, supra* at ____.

CHAPTER 15

Sentencing

15.2 Sentencing for Major Controlled Substance Offenses

Replace the language preceding subsection (A) on pages 316 and 317 with the following:

Major controlled substance offenses are defined in the Code of Criminal Procedure as any one of the following:

- ♦ a violation of section 7401(2)(a) of the public health code, MCL 333.7401(2)(a);
- ♦ a violation of section 7403(2)(a)(i) to (iv) of the public health code, MCL 333.7403(2)(a)(i) to (iv); or
- ♦ conspiracy to commit an offense listed above. MCL 761.2

A. Delivery Offenses Under §7401

Change the title of subsection (A) as indicated, and replace the entire content of subsection (A) on pages 317 and 318 with the following:

Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a) by changing the weight categories and corresponding penalties for all delivery offenses involving mixtures containing Schedule 1 or 2 narcotics or cocaine. Also changed under 2002 PA 665 is the consecutive sentencing provision under MCL 333.7401(3), which now makes consecutive sentencing for the commission of another felony discretionary. Finally, 2002 PA 665 added provisions allowing discharge from lifetime probation after an individual has served five or more years of that probationary period.

MCL 333.7401(2)(a), as amended by 2002 PA 665, delineates three new subsections of weight categories and punishment and leaves one subsection (Less Than 50 Grams)* intact, as follows:

1. 1,000 Grams or More

- Imprisonment for life or any terms of years or a maximum fine of \$1,000,000.00, or both. MCL 333.7401(2)(a)(i).
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).

*Except that effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a)(iv) by deleting the mandatory one-year imprisonment requirement for deliveries of less than 50 grams.

- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

2. 450 Grams or More, But Less than 1,000 Grams

- Imprisonment for not more than 30 years or a maximum fine of \$500,000.00, or both. MCL 333.7401(2)(a)(ii).
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).
- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

3. 50 Grams or More, But Less than 450 Grams

- Imprisonment for not more than 20 years or a maximum fine of \$250,000.00, or both. MCL 333.7401(2)(a)(iii).
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).
- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

4. Less Than 50 Grams

- Imprisonment for not more than 20 years or a maximum fine of \$25,000.00, or both. MCL 333.7401(2)(a)(iv).*
- Consecutive sentencing discretionary. MCL 333.7401(3).
- Eligible for probation, suspension of sentence, or parole. MCL 333.7401(3).
- Eligible for sentence reduction by disciplinary credits or other types of sentence credits. MCL 333.7401(3).

*Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a)(iv) by deleting the mandatory one-year imprisonment requirement.

B. Possession Offenses Under §7403

Effective March 1, 2003, 2002 PA 665 amended MCL 333.7403(2)(a) by changing the weight categories and corresponding penalties for all the possession offenses involving mixtures containing Schedule 1 or 2 narcotics or cocaine. In addition, 2002 PA 665 added provisions allowing discharge from lifetime probation after an individual has served five or more years of that probationary period.

MCL 333.7403(2)(a), as amended by 2002 PA 665, delineates three new subsections of weight categories and punishment but leaves two subsections

(25 Grams or More, But Less Than 50 Grams, and Less Than 25 Grams) intact, as follows:

1. 1,000 Grams or More

- Imprisonment for life or any terms of years or a maximum fine of \$1,000,000.00, or both. MCL 333.7403(2)(a)(i).

2. 450 Grams or More, But Less than 1,000 Grams

- Imprisonment for not more than 30 years or a maximum fine of \$500,000.00, or both. MCL 333.7403(2)(a)(ii).

3. 50 Grams or More, But Less than 450 Grams

- Imprisonment for not more than 20 years or a maximum fine of \$250,000.00, or both. MCL 333.7403(2)(a)(iii).

4. 25 Grams or More, But Less Than 50 Grams

- Imprisonment for not more than four years or a maximum fine of \$25,000.00, or both. MCL 333.7403(2)(a)(iv).*

*Effective March 1, 2003, 2002 PA 665 amended MCL 333.7403(2)(a)(iv) by deleting the mandatory one-year imprisonment requirement.

Update: Sexual Assault Benchbook

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.6 Concurrent Criminal and Civil Proceedings

B. The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

Insert the following "Note" at the top of page 505, after the December 2002 update:

Note: MRE 410 prohibits the admission of nolo contendere pleas except "in a civil proceeding to support a defense against a claim asserted by the person who entered the plea." MRE 609 permits the impeachment of a witness' credibility with proof of a conviction of a crime involving dishonesty or a false statement. The Court of Appeals in *Shuler v Michigan Physicians Mutual Liability Company*, ___ Mich App ___, ___ (2004), held that MRE 410 and MRE 609 do not conflict with each other. The Court stated:

"MRE 410 excludes evidence of a *plea* of no contest, while MRE 609 permits use of certain *convictions* for impeachment purposes, regardless whether the specific conviction followed a guilty plea, a no-contest plea, or a not-guilty plea." *Id.* at ___ (emphasis in original).

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Update: Traffic Benchbook— Revised Edition, Volume 2

CHAPTER 8

Felony Offenses in the Michigan Penal Code

8.1 Involuntary Manslaughter with a Motor Vehicle

B. Elements of the Offense

On page 8-2, replace the sentence following the last element, “4. The injury caused . . . ,” with the following language:

When a defendant is *charged* with manslaughter, both CJI2d 16.12 and CJI2d 16.14 (Negligent Homicide) must be given. See MCL 750.325 and Section 9.2.

CHAPTER 8

Felony Offenses in the Michigan Penal Code

8.1 Involuntary Manslaughter with a Motor Vehicle

E. Issues

Insert the following case summary on page 8-3 immediately before Section 8.2:

MCL 750.325 does not entitle a defendant charged with second-degree murder to a jury instruction on negligent homicide. *People v Weeder*, 469 Mich 493, 498 (2004). In *Weeder*, the defendant was charged with second-degree murder following an auto-related death, the trial court refused to instruct the jury on negligent homicide, and the jury convicted the defendant of involuntary manslaughter. *Weeder, supra* at 495–496. The Michigan Supreme Court disagreed with the defendant’s assertion that MCL 750.325 required that the jury be permitted to consider convicting him of negligent homicide where he was charged with second-degree murder but convicted of involuntary manslaughter. *Weeder, supra* at 498.

Notwithstanding the propriety of the trial court’s determination that the evidence did not support giving the jury a negligent homicide instruction (a question to be resolved by the Court of Appeals on remand), the Supreme Court emphasized that the plain and unambiguous language of MCL 750.325 clearly indicates that the statute applies only when a defendant is *charged* with manslaughter. *Weeder, supra* at 497–499. Because the defendant in *Weeder* was not charged with manslaughter in connection with the auto-related death, MCL 750.325 did not apply, and the defendant was not entitled to an instruction on negligent homicide on that basis. *Weeder, supra* at 498.

CHAPTER 9

Two Year Misdemeanors in the Michigan Penal Code

9.2 Negligent Homicide with a Motor Vehicle

E. Issues

Insert the following language on page 9-5, at the beginning of subsection (E):

MCL 750.325 does not entitle a defendant charged with second-degree murder to a jury instruction on negligent homicide. *People v Weeder*, 469 Mich 493, 498 (2004). MCL 750.325 states that negligent homicide is a lesser included offense of manslaughter and that “where a defendant is charged with manslaughter committed in the operation of any vehicle,” a jury may convict the defendant of negligent homicide.

In *Weeder*, the defendant was charged with second-degree murder following an auto-related death, the trial court refused to instruct the jury on negligent homicide, and the jury convicted the defendant of involuntary manslaughter. *Weeder*, *supra* at 495–496. The Michigan Supreme Court disagreed with the defendant’s assertion that MCL 750.325 required that the jury be permitted to consider convicting him of negligent homicide where he was charged with second-degree murder but convicted of involuntary manslaughter. *Weeder*, *supra* at 498.

The Supreme Court emphasized that the plain and unambiguous language of MCL 750.325 clearly indicates that the statute applies only when a defendant is *charged* with manslaughter. *Weeder*, *supra* at 497–498. Because the defendant in *Weeder* was not charged with manslaughter, MCL 750.325 did not apply, and the defendant was not entitled to an instruction on negligent homicide on that basis. *Weeder*, *supra* at 498. When MCL 750.325 does not apply, a defendant’s request for an instruction on negligent homicide may still be appropriate if negligent homicide is a necessarily included lesser offense of the charged offense, and where the evidence supports the instruction. *Weeder*, *supra* at 498–499, citing *People v Cornell*, 466 Mich 335 (2002).